SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1964
No. 381

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellant,

vs.

INTERSTATE COMMERCE COMMISSION, and UNITED STATES OF AMERICA, and CITY OF SAN RAFAEL, *et al.*,
Appellees.

On Appeal From the United States District Court for the Nothern District of California, Southern Division.

PETITION FOR REHEARING.

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Now Comes the appellant, Northwestern Pacific Railroad Company, by its counsel, and respectfully prays for a writ of rehearing of this case.

The Jurisdictional Statement previously filed herein presented as one of the questions:

> "3. Whether the net loss doctrine is applicable where the past and present revenues are considered, in view of the future lack of potentials in that the railroad business in the area involved, in the abandonment has been declining, there is little or no industrial future, and where alternate means of transportation service is available or provided."

There are two matters of importance to the railroad industry wherein the case below has changed the applicable law and represent a radical departure from the previous decisions of the Court.

The Relation of Unprofitable Segments of a Railroad to the Over-All System.

The court below in *Northwestern Pacific Railroad Company v. United States*, 238 F. Supp. 690, 694 (1964) erroneously applied the case of *Southern R. Co. v. North Carolina*, 376 U. S. 93, 103 (1964) when the court below held:

> "Consequently, we hold that no confiscation results from an order of the Interstate Commerce Commission denying the abandonment of rail services which are shown to be unprofitable, as long as there is no net loss to the over-all system."

in that it completely ignored footnote 16, pages 103-104 of the *Southern R. Co.* case, *supra*, wherein the court said:

> "neither . . . nor the profitability of all operations within any given State bears any practical relationship either to the public's need for the service in question or to the burden which the deficit imposes on interstate commerce."

The application of the District Court's language to an abandonment matter has the effect of setting aside and completely upsetting the rule of law announced in *Colorado v. United States*, 271 U. S. 152 and *Southern R. Co. v. North Carolina*, 376 U. S. 93, 100 (1964).

The Yardstick of Determining Long Run Losses.

The Commission and the court below used past revenues or business to determine future revenues or business and losses or profits.*

The method of using past revenues to determine future revenues may be proper if conditions are expected to be the same. However, in this case evidence was uncontradicted that conditions in the future would not continue as existed in the past, that is, future revenues bear no relation to past revenues.

There were two kinds of rail traffic in the area in question. Both types of traffic were in a downward decline. One type was traffic that originated or was destined in the area. This traffic in 1959 (if the local rock, sand and gravel traffic is eliminated) was 5.7 cars per day and in 1960 had fallen to 4.6 cars per day. The other type of traffic was bridge traffic carried through the area that originated from or was destined to the Santa Fe at Tiburon. This traffic had declined from 25 to 30% between 1959 and 1960.

The evidence was uncontradicted that the existing unoccupied land adjacent to the railroad was too expensive for carload industrial potential or use, and that the three principal industries in San Rafael, that is, the rock, sand and gravel operators, would be removed and forced out of their present locations by a future freeway with a resulting loss of their business in the area.

*The Interstate Commerce Commission in abandonment cases requires the applicant to file a Return to Questionnaire, 49 C. F. R. 42.6, that provides the applicant shall state the applicant's railway operating revenue for each of the last two calendar years, and for that part of the current year for which the information is available (49 C. F. R. 42.6 (14.c) that is used as evidence.

Thus, the use of past business to support a statement that future revenues would be the same is without authority in law. (*Universal Camera Corp. v. Labor Board*, 340 U. S. 474 (1951).)

Further, to compound its error, the Commission in its decision took the revenue of the whole system, not the area where the line has sought to be abandoned, and said the system revenue of previous years was an "indication that the need for transportation in the area is not undergoing an immediate decline." (320 I. C. C. 23.)

Obviously, system results cannot be used where there is direct and uncontradicted evidence that transportation in the area is undergoing a substantial decline.

Conclusion.

By reason of the foregoing, the Petition for Rehearing should be granted, the judgment below should be reversed and the order of the Interstate Commerce Commission be set aside.

Respectfully submitted,

RANDOLPH KARR,
Attorney for Appellant.

Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

RANDOLPH KARR
Attorney for Appellant

Certificate of Service.

I, Randolph Karr, attorney for Northwestern Pacific Railroad Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 10th day of December, 1964, at Los Angeles, Calif., I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid to The Solicitor General, William H. Orrick, Jr., Esq., Assistant Attorney General, and John H. D. Wigger, Esq., Attorney, Department of Justice, Washington 25, D.C., and with airmail postage prepaid to Cecil F. Poole, Esq., United States Attorney, for the Northern District of California, at Room 422 Post Office Building, San Francisco, California.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with air postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, and Robert S. Burk, Esq., its Attorney, Interstate Commerce Commission, Washington 25, D. C.

3. On the Cities of San Rafael, San Anselmo, Fairfax and Sausalito, California; County of Marin; Marin Industrial Development Foundation; Camgros Gravel and Fuel Co., Inc.; Chris-Craft Sales of San Rafael; Colonial Wax Products Corporation of California; Golden Gate Distributing Company; Henry Hess Company; California Newspapers, Inc. (San Rafael Independent Journal); McPhail Fuel Co.; PBM Inc.; Rice Supply, Inc.; A. G. Schoonmaker Co.; Service Lumber Co.; and Shamrock Materials, Inc., intervening

defendants, by mailing copies in a duly addressed envelope, with airmail postage prepaid to their respective attorneys of record:

Graham, James & Rolph,
Boris H. Lakusta, Esq.
E. Myron Bull, Jr., Esq.
310 Sansome Street
San Francisco 4, California

4. On The People of the State of California and The Public Utilities Commission of California, intervening defendants, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to their respective attorneys of record:

Richard E. Tuttle, Esq.
Hector Anninos, Esq.
State Building
San Francisco, California

and The Atchison, Topeka and Santa Fe Railway Company, intervening defendant, by mailing copy in duly addressed envelope, with airmail postage prepaid, to its attorney of record:

Frederick G. Pfrommer, Esq.
114 Sansome Street
San Francisco, California.

RANDOLPH KARR